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APPLICABILITY OF THE UNIVERSAL COPYRIGHT
CONVENTION TO CERTAIN WORKS IN THE PUBLIC DOMAIN
IN THEIR COUNTRY OF ORIGIN

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Background of this Study

At the Second Ordinary Session of the Intergovernmental Copyright Committee (IGCC) of the Universal Copyright Convention (UCC) held in Paris during November and December, 1977, the Delegation of the United States raised a question concerning the applicability of the UCC to certain works not protected by copyright in their country of origin. Paragraph 58 of the Final Report of the IGCC reads as follows:

58. The delegation of the United States of America raised, in a preliminary way and with the hope of future consideration by the Committee, a question concerning the application or interpretation of the Universal Copyright Convention. Under the United States copyright law all 'works of the United States Government' (works by government employees or officials written in their official capacity) are not protected in the United States. However, this provision is limited to United States Government works: publications of the governments of States party to the Universal Copyright Convention (other than basic official documents such as laws, decrees and regulations) are fully protected by copyright in the United States. The specific question is whether, because they are in the public domain in the United States, 'works of the United States Government' can be denied protection in other countries under the Universal Copyright Convention. This question raises a broader problem: in a case where the domestic law of country 'X' denies protection to works of a certain type originating in its own country but grants full protection to works of the same type originating in all other UCC countries (including country 'Y'), does the UCC permit country 'Y' to deny protection to works of that type originating in country 'X'? It was agreed that the Secretariat, possibly with the collaboration of one or more consultants, could study this problem and prepare a report to be submitted to the Committee at its next session.

At the request of the IGCC Secretariat, the Copyright Office agreed to act as consultant for this purpose and to prepare a report analyzing this problem. The present study is the product of this effort.

Preliminary Statement of the Problem

The specific situation that prompted this inquiry is a narrow one. Under section 105 of the new U.S. copyright statute,^{1/} "copyright protection . . . is not available for any work of the United States Government"; section 101 defines a "work of the United States Government" as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." The statutory prohibition against copyright extends not only to official works such as laws, regulations, and judicial rulings, but also to any work written by a U.S. Government employee within the scope of that employee's duties. Thus, a wide variety and huge number of "works of the United States Government" such as scientific and technical reports, scholarly writings, and compilations of data prepared by U.S. government employees are in the public domain in the United States. However, it should be emphasized that, for works prepared by officials and employees of governments other than that of the United States, copyright protection is not affected by the prohibition; assuming that they contain material constituting copyrightable subject matter,^{2/} works of foreign governments are protected in the United States under the Universal Convention.

The broad rationale behind the prohibition against protection for a work of the United States Government was that, since funds provided by the U.S. public through taxes had been used to produce the work, the work should be in the public domain in the United States and free for use by members of the U.S. public without copyright restrictions. During the legislative consideration of the bill that became the Copyright Act of 1976, Congress clearly recognized

that this rationale could not justify the denying of protection to U.S. Government works in other countries. The report of the House of Representatives on the bill stated:

The prohibition on copyright protection for United States Government works is not intended to have any effect on protection of these works abroad. Works of the governments of most other countries are copyrighted. There are no valid policy reasons for denying such protection to United States Government works in foreign countries, or for precluding the Government from making licenses for the use of its works abroad. 3/

Based on this belief -- that works of the United States Government are at least potentially eligible for copyright protection in other countries under the UCC -- U.S. Government agencies have placed a UCC copyright notice on their publications and have sought to license them for publication in other countries. In some cases these licenses have been successfully negotiated and implemented. In other cases, however, the U.S. negotiators have been met with arguments that, since the work is in the public domain in the United States, the other country has no obligation to give it any protection under the UCC; thus, it was argued, users in other countries are free to exploit U.S. Government works without licenses or royalty payments.

This specific question -- the copyright status of U.S. Government works in other UCC countries -- is a difficult one, involving an interpretation of various provisions of the Universal Convention and particularly Article IV(4). Because of the large volume and economic value of the works involved, the question raises important policy issues in the United States; these have already been considered by Committees of Congress, and further Congressional consideration of the matter has been promised. 4/ However, in seeking guidance in the interpretation of the UCC from the Intergovernmental Copyright Committee, the United States Delegation was also aware that broader international copyright issues are involved. These include:

- the nature of "national treatment" under the UCC;
- the extent to which reciprocity exists in the UCC under Article IV;
- the means by which the rights and obligations of the UCC are to be implemented by the countries adhering to the Convention.

The Authority of the Intergovernmental Copyright Committee to Consider the Question

There can be little doubt that the IGCC is authorized to consider this question, both in its narrower context and in its broader implications. The first duty of the Intergovernmental Copyright Committee that is mentioned in Article XI of both the 1952 and 1971 texts of the Convention^{5/} is "to study the problems concerning the application and operation of [the UCC]." Since its first session in 1955, the IGCC has repeatedly considered questions relating to the application of the Convention.^{6/} In fact, at its First and Second Sessions, in 1956 and 1957, the Committee concluded that it was competent to consider the implementation of Article IV(4) of the UCC, the very clause on which the present study is focused.^{7/}

A Brief Summary of the Principles Embodied in the UCC

National Treatment. The cornerstone of the Universal Copyright Convention is the principle of "national treatment," established by Article II, which prescribes in part:

1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Convention.
2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals, as well as the protection specially granted by this Convention.

The last clauses of each of these two paragraphs (reading "as well as the protection specially granted by this Convention") were added to the text of the 1952 Geneva Convention in its 1971 Paris revision. Under the 1952 text of Article II the UCC appeared to be a simple "national treatment" or "assimilation" treaty. Under "national treatment" in its purest form, Country A promises to protect works originating in Country B as if they were its own: in Country A nationals of Country B get the same "treatment" as that received by the "nationals" of Country A, and vice versa. Each country promises to "assimilate" the nationals of the other countries and to treat them as its own nationals for purposes of copyright protection.

The familiar problem with simple "national treatment" arises when Country A gives its own national authors a substantially higher level of protection than Country B gives to its own nationals. Country A must protect Country B works with its high-level copyright law, but Country B is required to provide only whatever protection -- if any -- it gives its own nationals, and there is no incentive to upgrade its domestic copyright law.

Minimum Requirements. To attract adherents from countries having different levels of copyright protection, a multilateral copyright convention must somehow even out the inequities of pure "national treatment." The most attractive method is to identify certain minimum obligations that all countries adhering to the convention should be required to accept. These "minima" are spelled out in the convention as jus conventionis, and added on top of simple national treatment. Country B, with its low-level domestic copyright law, must not only protect the works of Country A to the same extent as it protects its own works, but it must also protect the works of Country A in accordance with certain specific commands of the convention as a matter of international law.

Under a pure national treatment convention there is no question of discrimination between the protection a country offers its own authors and that

it gives foreign authors. Country A, with its high-level copyright, cannot retaliate and lower or deny its national copyright protection for works of Country B, even where Country B offers little or no protection to Country A works. By the same token, Country B has no obligation to give Country A works any more protection than it offers its own works.

When "minima" are added to national treatment, the possibilities for discrimination are greater. Country B must give all of the minimum rights and prerogatives spelled out in the convention to works of Country A, but there is no requirement under international law that Country B grant these rights and prerogatives to the same extent -- or to any extent -- to its own domestic works. On the other hand, there is a strong natural incentive for a country not to give foreign authors more protection than that it gives its own nationals. As a result, adding minimum requirements to a national treatment convention usually has the healthy result of lifting the over-all level of protection under domestic copyright law throughout all the countries bound by the treaty.

The history of the great Berne Convention starts with a fairly simple treaty based primarily on national treatment followed by a continuous process of adding, adjusting, and refining minimum requirements. Similarly, the original 1952 text of the Universal Copyright Convention consisted of a national treatment convention with four requirements that could be identified as "minima":

1. "Adequate and Effective Protection." The basic and rather vague requirement of Article I that the Contracting States undertake "to provide for the adequate and effective protection of the rights of authors"
2. Formalities. The requirement of Article III that, if a Contracting State provides any formalities as a condition of copyright, these formalities must all be considered satisfied if the work is published with a special UCC copyright notice.
3. Duration. The requirement of Article IV that, with certain qualifications and exceptions, the minimum copyright term for UCC works must either be the life of the author plus 25 years, or 25 years from publication or registration.

4. Translation Rights. The requirement of Article V that Contracting States provide for "the exclusive right of the author to make, publish, and authorize the making and publication of translations of works protected under this Convention"; this minimum requirement is qualified by provisions for compulsory licensing of translation rights under certain conditions.

At its first revision, in 1971, the UCC went further in adding minimum requirements on top of national treatment. As part of a broad program aimed at meeting the particular needs of developing countries in the copyright field without weakening either the UCC or the Berne Convention, the Paris Conference of 1971 made coordinated revisions in the 1952 UCC text and the 1967 Stockholm text of Berne. In general summary, the 1971 UCC text kept the four minima from the 1952 text and added three more in Article IV bis:

- The exclusive right to authorize reproduction by any means;
- The exclusive right to authorize public performance;
- The exclusive right to authorize broadcasting.

The new minima are stated in very broad terms; they can be subject to exceptions and qualifications as long as the Contracting State protects "the basic rights ensuring the author's economic interests" and accords "a reasonable degree of effective protection to each of the rights to which exception is made."

Developing countries are given special prerogatives, particularly with respect to translation and reproduction rights. Nevertheless, as paragraphs 40-46 of the 1971 Rapporteur's Report show, Article IV bis of the 1971 UCC text clearly establishes new minimum requirements and moves the Universal Convention closer to the mixture of national treatment and extensive minimum requirements that the Berne Convention has become.

Reciprocity

In international intellectual property law there is another device for achieving some degree of equitable treatment for works originating in countries with differing levels of protection. The principle of reciprocity is commonly

used in bilateral treaties in this field, and it is also found in some multi-lateral conventions instead of, or in conjunction with, national treatment and minima.

In very general terms, the parties to a treaty based on simple reciprocity promise to protect each other's works, but Country A does not bind itself to give any more protection to the works of Country B than Country B gives to the works of Country A. Thus, in the protection given between two countries, reciprocity means that there is no need to give more than that offered by the lower of the two. Implicit in the system are the need for comparisons and the prerogative of retaliating by discrimination -- by offering less protection to foreign authors than to domestic authors.

There is only one instance of the use of the principle of reciprocity in the 1952 and 1971 texts of the UCC. This is the "comparison of terms" provision of Article IV(4) -- the main provision with which this paper is concerned. The history, purpose, and interpretation of Article IV(4) will be discussed below in some detail, but a general point should be made here: the "comparison of terms" provision of Article IV(4), with its variation on the principle of reciprocity, is unique in the UCC, and is addressed to one special problem involving duration of copyright. At the 1971 Revision Conference there was strong and unanimous opposition to any suggestion that, except for Article IV(4), States could apply the principle of material reciprocity under either the 1952 or the 1971 texts of the UCC. The following passage from the 1971 Rapporteur's Report makes this point doubly clear:

58. During the discussion of Article V bis the delegation of Sweden raised a question (UCC/12) as to whether, because the proposed text of the revised Berne Convention contains a provision prohibiting the application of material reciprocity against States availing themselves of the special translation and reproduction licenses, the revised text of the UCC should not contain a similar provision. There was no disagreement whatever upon the substance of this matter: the Conference unanimously

agreed that material reciprocity could not be applied in this situation. It was also agreed early in the discussion that, if the UCC text was to contain such a provision, it should not appear in Article V bis but in a general clause later in the Convention text. The question resolved itself into whether the declaration against material reciprocity should go into the text of the Convention or be contained in this General Report.

59. The UCC Main Commission was divided on this question, which was the subject of two special meetings of the Drafting Committee. This Committee produced the draft text of a new article (UCC/24 Rev.) and the draft of a section of this General Report (UCC/28), which had been submitted to the Drafting Committee by the delegation of France (UCC/CR.1). The Main Commission voted not to include the proposed text of a new Article VII bis in the Convention, with seventeen delegations voting against inclusion, ten voting for and two abstaining from the vote. Thereupon it was decided, without dissent, to include the Drafting Committee's proposed language (UCC/28) in this report, and I am, therefore, indebted to that Committee, and the delegation of France, for the following five paragraphs:

'The Conference considered whether the text of the revised convention should or should not include an express provision prohibiting all material reciprocity in respect of a State availing itself of the exceptions mentioned in this Convention -- whether these were the special exceptions provided for in Article V ter and V quater in favour of developing countries, or the exceptions of a general nature provided for in Article IV bis.

'There was general agreement on the following:

- '(1) With regard to material reciprocity, no discrimination should be made between the exceptions in Articles V ter and V quater and those in Article IV bis.
- '(2) The fact of a State's availing itself of any exception should in no case permit other Contracting States to reduce the level of protection granted by them to works originating in the State in question.
- '(3) The principle of the absence of material reciprocity already exists in the 1952 Convention. It derives from the principle of the assimilation of foreign authors and works to national authors and works.

The fact that such reciprocity is permitted on only one, precisely specified point, viz. the duration of protection, underlines the fact that this constitutes the sole exception to a general principle and that where the text is silent, it can only be interpreted in the light of the principle of non-reciprocity.

'It therefore appeared that the inclusion of a special article specifying that the fact of a State's availing itself of exceptions would not permit any retaliation under the principle of material reciprocity, could be interpreted as a reversal of the presumption of absence of material reciprocity which governed the 1952 Convention and that consequently, States remaining party to the 1952 Convention alone, would in future be able to interpret that Convention as being governed by the principle of material reciprocity.

'To avoid any such interpretation and taking note of a general agreement excluding all possibility of retaliation based on the idea of material reciprocity, the Conference was of the opinion that the inclusion of an article expressly excluding material reciprocity could serve no useful purpose and would only weaken a principle which was generally accepted and which should continue to govern both the present Convention and the Convention of 1952.'
[emphasis supplied]

The "Comparison of Terms" Provision of the UCC

As the foregoing quotation from the 1971 Rapporteur's Report makes clear, the only conceivable basis a UCC country could find for denying protection to U.S. Government works is the "comparison of terms" provision of Article IV(4). Otherwise, assuming that the country protects government works under its own copyright law, it would be obliged to protect U.S. Government works under the principle of national treatment. It will therefore be necessary for this paper to examine Article IV(4) in some detail.

As noted above, Article IV, dealing with duration of copyright, reflects one of the four "minima" of the 1952 UCC, which were also carried over to the 1971 text. The first clause of Article IV restates the principle of national treatment in relation to the term of copyright:

1. The duration of protection of a work shall be governed, in accordance with the provisions of Article II and this Article, by the law of the Contracting State in which protection is claimed.

Clauses (2) and (3) lay out the minimum requirements of the Convention with respect to duration. The basic UCC term "shall not be less than the life of the author and 25 years after his death." Exceptions to this minimum rule are made for:

(1) States which, on the UCC's effective date, have "limited this term for certain classes of works";^{8/} (2) States which, on the UCC's effective date, do not "compute the term of protection upon the basis of the life of the author";^{9/} and (3) photographic works and works of applied art.^{10/}

The second of these exceptions, allowing a State to base a minimum 25-year term of protection on publication or registration rather than the life of the author, represents one of the major compromises of the UCC. Before 1978,^{11/} the United States computed the length of a copyright from publication or registration; the total 56-year duration of a copyright was divided into two terms: a first term of 28 years and a renewal term of the same length. Article IV(2) permitted the United States to adhere to the Universal Convention since the first of its two "successive terms of protection" was "not less than" the 25-year minimum specified in clause (2).

The principle of national treatment enunciated in Article IV(1), already qualified by the minima provided by clauses (2) and (3), is even more sharply qualified by Article IV(4). The first paragraph of that clause introduces the only example of reciprocity in the UCC:

4. (a) No Contracting State shall be obliged to grant protection to a work for a period longer than that fixed for the class of works to which the work in question belongs, in the case of unpublished works by the law of the Contracting State of which the author is a national, and in the case of published works by the law of the Contracting State in which the work has been first published.

This clause is usually called the provision on "comparison of terms" (comparaison des délais), but is also referred to as "the rule of the shorter term."

Comparable provisions have appeared in the various texts of the Berne Convention since 1886;^{12/} the "comparison of terms" provision in the Stockholm text (1967) and the Paris text (1971) is found in paragraph 8 of article 7.

The remainder of Article IV of the UCC consists of refinements and qualifications on the basic rule quoted above. The second paragraph of clause (4) covers the application of comparison of terms to works of countries providing "two or more successive terms of protection."^{13/} Under paragraph (5), a work by a national of a Contracting State, first published in a non-Contracting State, is to be treated as if it had been first published in the Contracting State of which the author is a national.^{14/} Paragraph (6) deals with cases of simultaneous publication.^{15/}

The Issues Raised by Article IV(4)

In considering the application of Article IV(4) to the protection of works of the United States Government under the UCC, it is necessary to consider three separate questions:

1) The scope of reciprocity under Article IV(4). Under what circumstances is Country A (where protection is claimed) entitled to deny protection to a work of Country B?

- Where the class into which the work falls is subject to protection in both Country A and in Country B, but for different terms, and the term of protection in Country B has expired?
- Where the class into which the work falls is subject to copyright in both countries, but protection for the work in Country B has been lost through failure to comply with formalities?
- Where the class into which the work falls is subject to copyright in Country A but not in Country B?

2) The meaning of "class of works." Since the minimum term in Country A need be no longer than that fixed in Country B "for the class of works

to which the work in question belongs," what constitutes a "class of works" for this purpose?

3) Implementation. Can the courts of Country A deny protection under Article IV(4) without the government of Country A first taking some action to implement the rule of comparison of terms? If implementation of some sort is required, what form should it take?

The Scope of Reciprocity Under Article IV(4)

The question of comparison of terms was raised and debated during the preparatory work leading to adoption of the Universal Copyright Convention. The Third Committee of International Copyright Experts, which met in Washington, D.C., in the fall of 1950, submitted recommendations, and these formed the basis for the work of a Fourth Committee of Copyright Experts, which met at Paris in 1952 to prepare a first draft of the Universal Copyright Convention. Paragraph (E)(2) of the Washington Committee's recommendations covered "Minimum duration," and contained the following statement, referred to as "Dissenting opinions":

Certain experts are of the opinion that the terms of protection hereinbefore indicated ought to be accompanied by a clause specifying that the countries in which the protection will be claimed shall be under no obligation to grant a term exceeding that fixed in the country of origin of the work. 16/

The preliminary draft of the Universal Copyright Convention that was prepared by the Fourth Committee of Experts on the basis of these recommendations 17/ became document DA/2, the so-called "programme text" of the Intergovernmental Copyright Conference held at Geneva in August and September, 1952. With respect to the duration of copyright, document DA/2 laid out three Alternative Propositions for consideration by the delegates: 18/

• Proposition A

1. As a general rule, duration would be based on national treatment.
2. However, duration would be subject to alternative minimum requirements. Either:
 - (a) 25 years from publication or registration, or
 - (b) Life plus 25 years.

• Proposition B

1. Same as Proposition A (national treatment).
2. Same as Proposition A (minima of either 25 years from publication/registration or life plus 25).
3. An added provision for comparison of terms:
 - 3) No Contracting State shall be obliged to accord protection for a term longer than that fixed by the law of the country of first publication of the work, and in the case of unpublished works, by the law of the country of which the author is a national.

In the case of simultaneous publication in two or more countries, the laws of which provide for different terms of protection, the shortest alone will be taken into consideration.

• Proposition C

1. Same as Proposition A (national treatment).
2. However, duration would be subject to a single minimum requirement: life plus 30 years. (Term based on publication/registration would not be permitted.)
3. Same as Proposition B (comparison of terms).

In the responses to questionnaires sent out in advance of the diplomatic conference, these proposals attracted considerable comment from governments. Luxembourg, Turkey, and the United States of America were the only three governments supporting Proposition A.^{19/} In its comments, Luxembourg noted that the alternative was "closest to the spirit of our national law, under which the rights of foreigners are not subject to any condition regarding reciprocal treatment."^{20/} To the United

States of America, Proposition A was "consistent with the principle of national treatment, which is the governing principle of the Convention."^{21/}

Of the remaining 25 governments that commented directly on Article IV, all but one^{22/} favored either Proposition B or Proposition C -- both of which proposals provided for a comparison of terms. Four countries -- Syria, The United Kingdom, Switzerland, and Yugoslavia, expressed definite preference for Proposition B.^{23/} Three other countries -- Mexico, Italy, and Norway -- appeared to lean toward a preference for Proposition C, but to recognize Proposition B as an acceptable, and possibly necessary, compromise.^{24/} Three governments -- the Netherlands, the Philippines, and Brazil -- appeared to favor either Proposition B or Proposition C, but did not express a clear preference between them.^{25/} All of the other fourteen governments came out in favor of Proposition C, with its provision for comparison of terms and its longer minimum term of protection based exclusively on the life of the author.^{26/}

The comments of eight governments expressly favored some form of reciprocity with respect to the duration of protection: Chile, Mexico, India, Denmark, Norway, Finland, Italy, and the Netherlands. For example, Italy expressed the view that:

. . . it is not considered that approval can be given to the system described in Proposition A, which takes no account of the principle of [comparison of terms] . . . and gives preference to the shorter term.

Chile noted that "[i]t is contrary to logic and equity that a foreign author should be able to enjoy in another country greater protection than is given him in his own country," and Finland, focusing upon the relationship of Article II to the provision on duration, observed:

If, as appears from Article II, the Convention is to be based mainly on national treatment, it would be desirable that the principle of reciprocity be applied with regard to the period of protection.

To the Netherlands, the addition of a system for comparison of terms was "essential":

The other system, laid down in Proposal A, seems unfair because the countries that grant a longer protection than is envisaged by the convention will have to apply that protection also to works of nationals of countries where only a minimum protection is granted, without their own nationals having the right to claim more than the minimum protection in the latter countries.

The Netherlands Government wants to draw attention to the fact that the system of comparison of periods also gives the opportunity to exclude the protection of works which have already fallen in public domain in the country of first publication, or, if non-published, in that of their authors.

Such exclusion is considered fair and proper. For example, if a screen version is made from a novel fallen in public domain in the country of first publication, it seems undesirable that this screen-version may come in conflict with a copyright concerning the original novel still existing in other countries.

Against this background of governmental responses to the draft Convention, the Intergovernmental Copyright Conference met at Geneva from August 18 to September 6, 1952, to draw up and adopt the final text of the Universal Copyright Convention. Given the complexity of the issues and the strong views already expressed, it is no surprise that, in the words of Sir John Blake, General Rapporteur of the 1952 Conference, "Article IV on the duration of copyright proved to be one of the most controversial articles."^{27/}

The difficulties that attended the drafting of Article IV were varied: anxiety over the low minimum term of protection on the part of some states, the need to reconcile national terms calculated either on the basis of the life of the author or from first publication, the peculiar two-term U.S. copyright system then in effect, and the comparison of terms question. It is interesting to note that, even before the discussion of copyright duration began, the question of comparison of terms was raised in a different context.

During discussion of Article II, the delegation of Japan raised a question close to the one under examination in this study. Attempting to clarify the field of application of the Convention, Japan asked:

Exactly how far, according to the terms of the proposed text, would assimilation extend? Was the intention to protect all rights, and to make the Convention apply even to works which were not protected in the States of which their authors were nationals or in whose territory they were published for the first time? 28/

Notwithstanding the explanation of the General Rapporteur of the 1951 Committee of Experts that the "Committee had aimed at the widest possible degree of assimilation, and had not thought it necessary to adopt the principle of reciprocity,"^{29/} the Japanese delegation pressed for clarification of Article II through a proposed amendment. That amendment (document DA/16) would have included, as paragraph 2 bis in Article II, the following provision:

The Contracting States are not obliged to grant any protection to published works which are not protected in their country of their first publication, nor to unpublished works, which are not protected in the country of which the author is a national. Works first published in a non-Contracting State are, for application of this paragraph, considered as being unpublished. 30/

The rationale given for the Japanese amendment was "that it would be useless to provide protection for works which were not protected either in the author's own country or in the country where they were first published, since that would amount to granting rights which no one could claim and which were, therefore, non-existent."^{31/} This argument is difficult to sustain in view of the fundamental principle that copyright is not extraterritorial, but it reflected a rather strong sentiment favoring some sort of reciprocity with respect to duration.

The Conference seemed unwilling to come to grips with the problem of reciprocity in the context of Article II. Yet, although the Japanese amendment was defeated,^{32/} it was obvious that the issue of "reciprocity," would have to be considered in the context of Article IV. This was noted by the delegation of Japan, which admitted that its proposed amendment might be superfluous, depending upon the final contents of Article IV:

. . . in the event of Proposals (B) or (C) of Article IV of the Preliminary Draft being adopted (DA/2), the third paragraph of those proposals allowed a certain amount of latitude with regard to the duration of protection. Works which were not protected in the author's own country were likewise, according to the provisions of that paragraph, not to be entitled to protection in the country where such protection was claimed. 33/

The ensuing debate over duration and Article IV provided more fertile ground for discussion of the issue initially raised under Article II. As the comments from governments on the alternative proposals prepared by the Committee of Experts had shown, considerable sentiment existed in favor of the principle of comparison of terms. That the demands for a comparison of terms provision were closely linked to concerns over the very low minimum term proposed in the programme text was plainly reflected in the statement of the delegate of Italy, who opposed Proposition A:

. . . as it took no account of the principle of comparison of terms, enabling the shortest term to be applied. It would really be very unfortunate if a Contracting State were to protect a foreign author's work, which had already passed into the public domain in his country of origin. If a very high minimum duration were adopted (e.g., 50 years after the author's death) the Italian delegation would renounce the principle of comparison of terms. 34/ [emphasis added]

The Japanese delegation proposed a new amendment to Article IV, to make clear the effect of comparison of terms under Propositions B and C. ^{35/} Worded quite differently from DA/16, the new Japanese proposal, DA/83, was intended to reach the same result through the addition of a new fourth paragraph to the Alternative Propositions B and C:

In case where no protection is granted to a published work in the country of its first publication or to an unpublished work in the country of its author, the Contracting States are free to deprive such work of protection.

The Japanese delegate emphasized that, under this proposal, limitation on the principle of assimilation would be permitted but not required. 36/

The multiplicity of technical and philosophical problems raised by Article IV, the interdependency of any solutions, and a growing recognition that the work of the Conference could founder on the issue of duration, generated a feeling that some compromise would be needed. Attempts to formulate consensus proposals began to center around Proposition B.

The first such effort was an amendment proposed jointly by Austria, the Federal Republic of Germany, Italy, the Netherlands, Switzerland, and the United Kingdom. Their proposal (document DA/102) would have adopted the first two paragraphs of Proposal B, and would have changed paragraph 3 to read as follows:

The Contracting States shall not be held to grant protection to a work fallen in the public domain as a result of the expiration of the term of protection in the country of its first publication and, with regard to unpublished works in the country of which the author is a national. 37/

This and other proposals 38/ were considered by the Conference, but all of them were withdrawn on August 29, 1952, in favor of a consensus proposal (document DA/137) submitted by Austria, Denmark, Finland, France, Italy, Mexico, Norway, Sweden, the United Kingdom, and the United States. 39/ This proposal, which was very close to the text of Article IV finally adopted by the Conference, included the following language on the comparison of terms:

No Contracting State shall be obliged to accord protection to any class of works for a period longer than that fixed for that class of works, by the law of the State of first publication, if that State be a Contracting State, and in the case of unpublished works, by the law of the Contracting State of which the author is a national.

Document DA/137 was introduced by the Chairman, with the observation that it met, at least in part, concerns of the delegation of Japan embodied in document DA/83. 40/ The delegation of Japan, while supporting document DA/137 in general, still felt that:

. . . it would not be without interest to consider the Japanese proposal DA/83. That proposal might remove any doubts with regard to the interpretation of subparagraph 1 of paragraph 4 of Article IV (DA/137). He thought that in the case where a work was not protected in its country of origin, it could not be protected in the country where protection was claimed. 41/

Similar concerns were expressed by the delegation of Spain, ^{42/} and it became apparent during the ensuing discussion that there were divergent interpretations of the first paragraph of Article IV(4) in document DA/137. At root the question was whether the language of the proposal would permit a UCC country to deny protection for a work that had fallen into the public domain in the country of origin because of failure to comply with formalities. The delegate of the United States pointed out:

. . . that the first sentence of paragraph 4 provided for a comparison of terms with respect to classes of works, while the second and third sentences referred to specific works. Therefore during the initial term of protection the question was not whether a specific work was protected in the country of origin, but whether the class to which the work belonged was protected, while with respect to the second or subsequent terms, the work was entitled to protection in other Contracting States only if protected in the State of origin. 43/
[emphasis in original]

The U.S.A. proposed the following amendment to be inserted at the end of paragraph 4 of Article IV:

The enjoyment and exercise of copyright in the other Contracting States shall be independent of the existence of protection in the country of origin of the work. 44/

This had the effect of postponing final action on Article IV for several days.

At the opening of the 22nd meeting of the Main Commission, on September 3, 1952, the Chairman (Plinio Bolla of Switzerland) summed up the existing situation:

A difficulty of interpretation had arisen just as the vote was to be taken on the document as a whole. The Japanese delegation having asked whether paragraph 4, would not in practice have the result of admitting what Japan had asked for in its two proposals (DA/16 on Article II and DA/83 on Article IV), divergent opinions had been expressed. 45/

The Chairman explained that consideration of this question of interpretation had led him to certain personal conclusions:

If a work belonged to a category which was protected in Contracting State A but not in Contracting State B, a work of that category connected with State B (as the place of first publication or by the nationality of the author) could not claim protection in State A. For according to paragraph 4, first phrase, the term to be compared was equal to zero, and State A would not be obligated to grant protection for longer than zero years.

On the other hand, if a given work, while belonging to a category protected in States A and B, was not, for some reason (e.g., failure to comply with formalities), protected in State B with which it was connected, it should be protected in State A, unless the exception mentioned in paragraph 4 in fine applied, i.e., unless State B granted two or more successive terms of protection and protection in State A was claimed for the second or third term. 46/ [emphasis in original]

The Chairman added that the sponsors of document DA/137 had clarified the language of the first paragraph of Article IV(4), and that there was now general agreement on the new text (document DA/179), which read as follows:

No Contracting State shall be obliged to grant protection to a work for a period longer than that fixed for the class of works to which the work in question belongs; (a) in the case of unpublished works by the law of the Contracting State of which the author is a national; and (b) in the case of published works by the law of the Contracting State in which the work has been first published. 47/

Without any extensive debate on this interpretation, the proposed text of DA/137, as amended by DA/179, was adopted by 31 votes to none, with nine abstentions. 48/ Note that, as the result of a proposal by the Drafting Committee, 49/ the semi-colons and designations "(a)" and "(b)" were dropped from the final text of Article IV(4).

The convoluted history of Article IV(4), was elegantly summarized by Sir John Blake, the Conference's General Rapporteur, in his Final Report, from which the following are excerpts:

Many delegations supported the principle of comparison of terms expressed in paragraph 3 of Proposition B or C, arguing that this was similar to a provision of the Berne Convention prior to the Brussels revision; that it was just; and that it might serve to provide an incentive to any country granting a relatively short period of protection to increase this term. Some delegations considered that a work not protected in its own country need not be protected in other States. Some delegations pointed out that the programme text of paragraph 3 was not clear in a number of respects, including its application to cases where copyright was renewable for a second period. The United States preferred Proposition A and were unfavourable to the provisions of paragraph 3 of Proposition B or C; they doubted whether this principle of comparison of terms would be effective as an incentive, and they pointed to the manifold complications which it introduced in practice.

After considerable discussion, a joint proposal was made . . . (DA/137), elaborating paragraphs 2 and 3 of Proposition B to meet the criticisms which had been expressed in the discussion The revised and amended joint proposal was finally adopted A fourth paragraph in the adopted joint proposal dealt with the principle of comparison of terms. It provided that a Contracting State need not protect a work for a period longer than that fixed in the country of origin for the class of works to which the work belonged, the country of origin being defined in this and succeeding paragraphs. . . . It was . . . understood that if the class to which a work belonged was not protected in the country of origin, so that the period of protection there was zero, other Contracting States need not protect the work, whereas, if the class of work was protected in the country of origin, the fact that the work itself was not so protected, due for example to failure to comply with formalities, would not relieve other countries from protecting it. 50/

Based on the history of Article IV(4) and the General Rapporteur's authoritative interpretation of it, we can draw some fairly definite conclusions about the purposes behind the comparison of terms provision and the scope of reciprocity under it.

Main purpose: reciprocity with respect to duration

The reason so many countries insisted on a comparison of terms provision in Article IV(4) was that the minimum term of protection in Article IV(2) was so low. Only four years earlier, at Brussels, the Berne Convention had made a term of the author's life plus 50 years obligatory. One of the main purposes of the UCC was to link the United States with the Berne Union countries, and by the end of the UCC Conference the Berne countries had been forced to recognize that there was no possibility of U.S. adherence to the UCC unless it was allowed to keep its short two-term system. At the same time, the differences between the UCC minimum of 25 years from publication and the Berne minimum of life-plus-fifty were too great for the Berne countries to accept without some possibility of retaliation.

What emerged were two compromises that determined the scope of Article IV(4). The first compromise was a fundamental breakthrough: the Berne countries agreed to national treatment and a low minimum term, in exchange for limited reciprocity in the form of a comparison of terms provision. When it became clear at the UCC Conference that the minimum term could not be raised, the Berne countries insisted on a comparison of terms provision similar to the one that had been in the Berne Convention since its inception. The Berne provision had, in fact, induced Berne Union countries over the years to raise the duration of copyright under their domestic law, and it was hoped that a similar provision in the UCC would have the same effect on the United States and on other countries with a short term.^{51/}

The net effect of introducing limited reciprocity for duration into Article IV was thus twofold: (1) to create an incentive for non-Berne countries to set their terms of copyright duration well above the UCC minimum; and (2) to give Berne countries a legal method for redressing what many perceived as an inequity -- that is, the possibility that states offering

low levels of protection would be able to derive the benefits of strong copyright regimes in Berne countries without offering anything in return.

Secondary purpose: reciprocity with respect to eligibility of "class of works"

As the debates on Article IV(4) proceeded it became apparent that a secondary question would have to be answered one way or the other: if a work is in the public domain in Country B, its country of origin, for some reason other than expiration of the term of copyright, can Country A (where protection is claimed) deny it protection?

Consideration of this question resulted in a second compromise, the key to which is in the phrase "class of works." The delegates at Geneva accepted the argument that, if a work falls into a "class" or "category" of works that are not eligible for protection in Country B (the country of origin), then Country A (where protection is claimed) should be under no obligation to protect them. They accomplished this result by adopting the legal fiction of a "zero term": since the term of protection for the "class of works" into which the work falls is "zero years," Country A can "cut back to zero" the term of protection it would ordinarily have to offer the work under national ^{52/}treatment.

Under this compromise a very sharp distinction was drawn between "classes" or "categories" of works on the one hand, and "specific works" or "given works" on the other. The Conference had before it proposals, put forward on several occasions by the delegation of Japan, to establish complete reciprocity between two countries with respect to the existence of protection for the specific work in question; under the Japanese proposal, if a specific work was in the public domain in its country of origin for any reason (for example, for failure to comply with formalities), the other Contracting States would have no obligation to protect it. These proposals were not accepted.

Instead, the record of the Conference and the Report of the General Rapporteur make clear that, as long as the specific work belongs to a class that is protected in the country of origin and the term applicable to that class has not expired, the other Contracting States are bound to protect it even if it is in the public domain in its own country.^{53/}

The scope of reciprocity under Article IV(4)

The prerogatives given to a Contracting State with respect to "comparison of terms" under Article IV(4) can be referred to as "reciprocity," but of a specific and limited kind.

● What a country can do under Article IV(4). Under the comparison of terms provision there are basically two types of "comparisons" that the country where protection is claimed (Country A) can make with respect to works of Country B:

(1) Comparison of duration for class of works. Under Article IV(4), Country A can, if it chooses, refuse to protect a work of Country B, if the work belongs to a class that is protected longer in Country A than in Country B, and if the copyright term for the class in Country B has expired.

(2) Comparison of eligibility of class of works. Under Article IV(4), Country A can, if it chooses, refuse to protect a work of Country B, if the work belongs to a class that is protectible in Country A but is not protectible in Country B.

● What a country cannot do under Article IV(4). There are two types of "reciprocity" or "comparisons" that a country cannot apply under Article IV(4):

1. No comparison of protection for rights. In a case where a work of Country B belongs to a class that is protected in both Country A and Country B, and the copyright term for that class has not expired in

either Country A or Country B, Country A must offer the work the same rights as those applicable to its own works -- even if those rights are much more limited, or are denied outright, in Country B. As the passage from the 1971 Rapporteur's Report, quoted above, makes clear, material reciprocity of this sort is not possible under the UCC.^{54/}

2. No comparison of protection for individual works. Where a specific work of Country B belongs to a class that is protected in both Country A and Country B, and the copyright term for that class has not yet expired in either Country A or Country B, Country A must protect the work even if it is in the public domain in Country B.^{55/} The work may be in the public domain in Country B because of failure ever to secure copyright protection, or because protection has been lost for some reason or other. It may be in the public domain because of failure to comply with formalities (such as notice, registration, deposit, publication, recordation, manufacture, etc.), but this is not the only possible reason. For example, the two countries may apply different standards of artistic merit or originality in determining the copyrightability of a particular work. Another possibility arises where the country of origin refuses to protect the work because it regards its contents as obscene, seditious, or otherwise against the public interest. In none of these cases can Country A deny protection on the ground that it is denied in Country B.

Turning to the specific question that prompted this inquiry, the United States protects a broad "class" of government works, including: government publications of other countries; government works of U.S. governments below the federal level (states, counties, cities, etc.); and works written under U.S. federal government contract and published by the federal government. The United States does not protect "works of the U.S. government" -- works written by its own government employees within the scope of their employment.

Does a "work of the United States Government" belong to the kind of "class of works" to which other countries can deny protection under Article IV(4)? If the United States denied protection to all government works, including those of foreign countries, it would certainly be arguable that comparison of terms could be applied to the "class." But, where the United States grants protection to all government works except those written by its own employees, the purposes to be served by applying reciprocity do not arise; a country whose government works are being protected in the United States has nothing to retaliate against.

There is nothing in the history of Article IV(4) to suggest that the delegates intended to cover this type of situation within the scope of the rule of comparison of terms. Nevertheless, the literal wording of the provision can be construed to mean that, if the only "class" to be considered is that comprising "works of the United States Government," then a work belonging to that "class" can be denied protection in other UCC countries. It is therefore necessary to look closely at the meaning of the phrase "class of works" in Article IV(4).

The Meaning of "Class of Works" in Article IV(4)

The phrase "certain classes of works" in Article IV(2)

The concept of "class of works" appears not only in the "comparison of terms" provision of Article IV(4) but also in the basic provisions of Article IV(2) establishing the minimum term of protection under the UCC. Since the two provisions are closely interrelated and use the same word -- "class" -- in the same context -- duration of copyright -- it is necessary to examine what the word "class" means in Article IV(2).

At the Geneva diplomatic conference the question of including in the UCC special provisions governing the minimum duration of protection for specific "classes" of works arose early in the discussions of Article IV. Alternative

Propositions A, B, and C were all criticized for failing to take account of provisions in many domestic laws establishing special terms for particular classes of works. Among the categories mentioned most often were cinematographic works, photographic works, works of applied art, anonymous works, pseudonymous works, and posthumous works. Other classes of works mentioned as possibly not fitting within the proposed scheme of Article IV were: sound recordings; collective works such as periodicals, catalogues, almanacs, and directories; architectural works; works of the United Nations and its specialized agencies;^{56/} "official publications";^{57/} and "government and university publications."^{58/}

As the discussion of Article IV proceeded, a consensus began to emerge around several conclusions: (1) the convention should permit countries whose basic term was computed from the death of the author to compute the term for "certain classes of works" from the date of publication rather than the life of the author; (2) it was preferable not to try to enumerate all of the possible "classes" for this purpose; (3) the minimum term of 25 years from publication should apply to "classes"; (4) the special case of a country like the United States, which did not base duration on the life of the author and divided copyright duration into successive terms, should be dealt with separately; and, (5) for two classes of works (photographic works and works of applied art), special provisions were desirable.

All five of these points were embodied in document DA/137,^{59/} the major compromise proposal that laid the groundwork for the final text of Article IV. Under this proposal, Article IV established a requirement of national treatment and basic minimum term of life-plus-25 years, but qualified these requirements in four ways:

1. A country that, for "certain classes of works," has limited the standard term based on the life of the author "to a period computed from the first publication of the work," could

"maintain these exceptions" and "extend them to other classes of works." In such cases the minimum term would be "not less than 25 years from the date of publication." (This is now the second sentence of Article IV(2)(a) of the UCC.)

2. For countries (like the United States) that did not adopt the standard term based on the life of the author, a minimum term of 25 years from first publication (or registration prior to publication) was required; if two successive terms were granted the first of the terms had to meet this minimum. (This is now Article IV(2)(b) and (c) of the UCC.)

3. Protection, if any, for photographic works and works of applied art (insofar as they were protected as artistic works) had to last for a minimum of ten years. (This is now Article IV(3) of the UCC.)

4. Under Article IV(4), the rule of "comparison of terms" could be applied to the term provided for the "class of works" in the country of origin.

^{60/}
As discussed above, the interpretation of the fourth of these qualifications proved to be controversial, and the language of document DA/137 on the point was redrafted. Except for this, however, the reaction by the delegates to the compromise proposal embodied in document DA/137 was quite positive. Questions were raised as to whether the phrase "certain classes of works" in Article IV(2) was sufficiently definite; a point of particular concern was whether anonymous, pseudonymous, and posthumous works would be considered "classes," enabling countries to give them special terms. The Chairman indicated that the General Rapporteur had agreed to include an interpretation to this effect in his report.^{61/}

During the debates on Article IV, the General Rapporteur (Sir John Blake of the United Kingdom) made two interpretative comments on paragraph (2), which are significant for our purposes. First, speaking at least partly as a governmental representative, he said --

. . . he understood that the term "certain classes of works" referred to in the second paragraph of the proposed text (DA/137) would also include official publications, which, in the United Kingdom, were protected for 50 years from the date of first publication. 62/

Later, just before the Main Commission's final vote on Article IV, he commented as General Rapporteur on the meaning of "classes" in both paragraph (2) and paragraph (4). He --

. . . recalled the doubts expressed about the precise meaning of the words "certain classes of works" in paragraph (2) of document DA/137 He explained that "certain classes of works" in paragraph 2 included not only clearly defined categories, such as photographic or cinematographic works, but also classes such as anonymous, pseudonymous or posthumous works. 63/

As he promised, this interpretation was included in the Rapporteur's report, which contained the following comments on paragraph 2:

It [Article IV] indicated in its second paragraph that the general duration of protection under the Convention should not be less than the life of the author and 25 years after his death, but provided that countries like the United Kingdom, which reckon the term of protection from first publication for special classes of works, such as anonymous works and official publications, could continue to do so for these and other classes of works; 64/
[emphasis supplied]

Later in the same paragraph, speaking of Article IV(4) on comparison of terms, the General Report states:

It was understood that the words "class of works" in this fourth paragraph and also in the second paragraph included not only kinds of works, such as photographs and cinematographic works, but also other recognized categories of works, such as anonymous, pseudonymous and posthumous works. 65/ [emphasis supplied]

This passage from the 1952 Report suggests two important conclusions with respect to the meaning of the word "class" in Article IV: (1) the word means the same in paragraph (4), with respect to comparison of terms, as it does in paragraph (2), with respect to minimum duration; and (2) it refers to "recognized categories of works." Bogisch, writing about the meaning of "classes" in paragraph 2, takes the view that any differentiated grouping that a country uses with respect to the length or computation of the term is a "class":

Subparagraph 2 uses the expression "classes" of works. What is the definition of "class" of works? Copyright laws frequently distinguish between works according to their artistic nature. Thus, literary, musical, artistic, etc., works would belong to separate classes. The author's identity may be a cause of classification: thus, there are works bearing the author's real name and pseudonymous works; works authored by natural persons and legal entities; by foreigners or nationals; by employees in the course of their employment and by self-employed authors; works published during the author's life and posthumous works. Published and unpublished works are frequently held to be distinct classes; or unpublished works unregistered as distinguished from registered unpublished works. The U.S. Copyright Law distinguishes between thirteen different classes for purposes of registration (17 U.S.C. §5). ^{66/}

It is believed that any group of works -- whether they are grouped according to the above or other bases -- is a class if they receive a different treatment than other works. For the purpose of Article IV only those bases of differentiation will be relevant which have a bearing on the length or computation of the term. ^{67/}

The phrase "class of works" in Article IV(4)

When the Geneva Conference came to the point of accepting the rule of comparison of terms as part of the broad compromise on Article IV, it had three choices: (1) it could limit the scope of reciprocity to cases where the work is in the public domain in the country of origin because the term of copyright has expired; ^{68/} (2) it could broaden the scope of reciprocity to cases where the work is in the public domain in the country of origin for any reason; ^{69/} or (3) it could take a middle position, based on the status in the country of origin of the

class to which the work belongs rather than the status of the work itself.

The first two of these alternatives were clearly rejected by the Conference.^{70/} The third, which emerged as a last minute compromise, was accepted with little or no scrutiny, and with practically no discussion of the precise scope of "class of works" in the context of comparison of terms.^{71/} The interpretation in the General Report links the meaning of "class of work" in paragraph (4) with that of "certain classes of works" in paragraph (2), but offers little additional illumination:

A fourth paragraph in the adopted joint proposal dealt with the principle of comparison of terms. It provided that a Contracting State need not protect a work for a period longer than that fixed in the country of origin for the class of works to which the work belonged, the country of origin being defined in this and succeeding paragraphs. It was understood that the words "class of work" in this fourth paragraph and also in the second paragraph included not only kinds of works, such as photographs and cinematographic works, but also other recognized categories of works, such as anonymous, pseudonymous, and posthumous works. It was also understood that if the class to which a work belonged was not protected in the country of origin, so that the period of protection there was zero, other Contracting States need not protect the work, whereas, if the class of works was protected in the country of origin, the fact that the work itself was not so protected, due for example to failure to comply with formalities, would not relieve other countries from protecting it. It was further understood that in a special case where a Contracting State granted the same term of protection for all classes of works, other States need not grant to works originating in the first State more than that term of protection. ^{72/}

The scope of "class of works"

In light of the rather sparse history of the phrase "class of works" in Article IV(4), and more particularly in light of the overall purposes the comparison of terms provision was intended to have, the following conclusions can be drawn:

(1) Under Article IV(4) a "class of works" must constitute a "recognized category" -- a specifically defined group that consists of works sharing at least one attribute in common and that, as a group, receives one or the other of two types of special treatment: either (a) all works in the group receive a specified term of protection; or (b) all works in the group receive no protection at all.

(2) The shared attributes that all works in the class must possess may have to do with the nature of the works themselves (e.g., architectural works, photographs), or with the origin of the works (e.g., governmental and intergovernmental publications), or with the impossibility of basing a term on the life of an individual author (e.g., anonymous, pseudonymous, posthumous, collective, and corporate works).

(3) The drafters of the UCC intended the term "class of works" to be interpreted broadly, and intended for Contracting States to have considerable flexibility in applying it. At the same time, a "class" must have some relation to the categories "recognized" and generally accepted as "classes" for particular purposes in national copyright laws. A "class of works" may consist of a combination of groups of works; it may also consist of a subdivision of a broader group. But the UCC clearly draws a distinction between a class that is a subdivision of a larger class and congeries of various individual works within a class. "Works published without a copyright notice" and "unregistered works in the public domain" are not "classes" within the meaning of Article IV.

(4) Assuming that the "comparison of terms" is to be applied by Country A (where protection is sought) to a work of Country B, the courts of Country A must first, under the national treatment obligation of Article IV(1), determine the scope of the relevant class to which the work belongs in Country A, and the length of the term applicable to that class. If the work is still

eligible for protection in Country A, the court must then look to the law of Country B to determine the corresponding class for the work under the law of Country B and the term, if any, offered that class in Country B. Finally, Country A compares the terms and applies the shorter of the two. It must do this without regard to actual status of the particular work in the country of origin. There must be some correspondence between the classes in the two countries before there can be a comparison of the terms offered them.

In the situation to which this study is addressed, the fundamental question is: what are the corresponding "classes of works" in the two countries?

Let us assume that protection for a "work of the United States Government" is sought in Country A, and that Country A, like the United States, protects government works generally. Thus, unless the comparison of terms provision is applicable to "works of the United States Government" as a "class of works," Country A would be obliged to give the work national treatment.

If it chose to do so, Country A could take the strict position that "works of the United States Government" constitute a "class of works," that the work in question belongs to a class that receives no protection in its country of origin, and that therefore, under the literal language of Article IV(4), Country A is under no obligation to protect it.

However, if a country took this position, it would be disregarding two factors that arguably should be taken into account in cases of this sort:

1. It disregards the necessity to look first at the class of works given protection in Country A -- the country where protection is sought -- and then to determine the corresponding class in Country B -- the country of origin -- without regard to whether the particular work is protected in Country B.
2. It disregards the fundamental purpose of the comparison of terms provision, which is to give Contracting States

an opportunity to assure reciprocity with respect to duration and eligibility. Since Country A's government works are fully protected in the United States, the question of reciprocal treatment does not arise, and the justification for applying comparison of terms does not exist.

The answer to this whole problem may be simple. It is possible to argue that:

- Country A must look first at its own law to determine the "class of works" to which the work in question belongs.
- Under Country A's own law, the relevant "class of works" is certainly not "works of the United States Government."
- The work that Country A is being called upon to protect under its own law belongs to a subdivision of the broad class of government works; the subdivision, which is a "class of works" in itself, is: "works of foreign governments."
- If Country A finds that, under its own law, it protects the class of "works of foreign governments," it must then look to the law of the United States to determine whether, under U.S. law, the corresponding class of "works of foreign governments" is protected.
- If Country A determines that the United States offers protection to the class of "works of foreign governments," and that the applicable term has not expired, there would be no basis for applying Article IV(4).

- Since, under Article IV(4), the only comparison of terms can be between classes, the status of the particular work in the country of origin cannot be taken into account. It therefore makes no difference that the work in question is in the public domain in the United States.

Implementation of the Comparison of Terms Provision

There is a final question to be considered by this paper: what must a Contracting State do in order to apply the comparison of terms provisions of Article IV(4)? This question has two parts:

- Is application of the rule of comparison of terms mandatory or optional?
- Assuming that the rule is optional and that a country is not obliged to apply it, is any governmental action needed to bring it into effect? If so, what form should that action take? Is some general rule in the form of legislative or executive action necessary, or is it enough for the rule to be applied by the country's courts on a case-by-case basis?

This general question, particularly the second part of it, has been the subject of a great deal of controversy.

Is Article IV(4) mandatory or optional?

The language in which the principle of comparison of terms as embodied in Article IV(4) suggests very strongly that the rule is optional, and that a country is not required under the UCC to apply the shorter term. It is useful to compare the wording of the UCC on this point with that of Article 7(8) of the 1971 text of the Berne Convention.

UCC, Article IV(4): No Contracting State shall be obliged to grant protection

Berne (1971), Article 7(8): In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.

Bogsch concludes that the rule of comparison of terms in the UCC is optional rather than mandatory, and states his conclusion as follows:

Contrary to the language used in most other international copyright treaties, the above rule is in a permissive form, i.e., contracting countries have the right but not the duty to "cut back" national duration to the duration prevailing in the work's country of origin. ^{73/}

This conclusion is supported by the history of Article IV(4).^{74/}

The comparison of terms provision as worded in Propositions B and C of the programme text^{75/} and in the compromise proposals advanced later in the Conference,^{76/} all opened with the same permissive language as that later adopted in the convention: "No Contracting State shall be obliged to grant protection" The optional nature of this language was never questioned at the Conference. The Japanese delegation, in urging acceptance of its proposal to widen the scope of reciprocity under Article IV, stressed that the provision ". . . did not actually limit the application of the principle of assimilation, but merely made it possible to limit it."^{77/} Significantly, Marcel Plaisant, speaking for the delegation of France, strongly urged the fairness of a system of comparison of terms, pointing out that --

. . . it should be admitted that Proposition C was highly logical, since it took account first of one proposition and then of a counter-proposition, and finally tried to reconcile them. Proposition C has been baptized "the system of comparison," tribute thus being paid to traditional terminology. It would however have been better, in this connexion, to speak of a "system of option."^{78/}

At the First Session of the UCC's Intergovernmental Copyright Committee (1956), the Committee was informed of a request by the Austrian Government for an interpretation of Article IV(4), specifically concerning the machinery necessary to implement the comparison of terms provision.^{79/} After a somewhat inconclusive debate on the subject, the IGCC agreed to request the Unesco Secretariat to prepare a full report on the matter, and to take the question up again at its next session.^{80/}

The first question raised and considered in the Secretariat's report was "the compulsory or optional character of the comparison of terms."^{81/} The conclusion of the report on the point was stated as follows:

It would appear from the statements made either in the Intergovernmental Committee or at the Geneva Conference that the comparison of terms is considered to be an optional rather than a compulsory system. The optional character of the comparison might also find confirmation in a literal interpretation of the phraseology used in Article IV, paragraph 4 ("No Contracting State shall be obliged . . ."); it would also be in conformity with the general principle of national treatment (Article II of the Convention) and with the terms employed by the Rapporteur-Général in his comments. ^{82/}

When the Intergovernmental Copyright Committee again took up the question at its Second Session (1957) it reached a conclusive result with respect to whether Article IV(4) is mandatory or optional. The report of the session states:

. . . the Committee was unanimous in noting that the provision is optional and that each State is free not to apply this principle. States may refrain from applying it without having to enact specific measures to that effect. ^{83/}

However, the differences of opinion on the second question -- what a state would have to do in order to implement the comparison of terms -- proved so great that the IGCC could offer no conclusion on the point.^{84/}

Means of implementation

In its 1957 Report on the Comparison of Terms of Protection for the Second Session of the IGCC, the Unesco Secretariat defined this difficult question as follows:

The consequences of the absence of specific legislative or other measures in regard to a comparison (optional) of terms:

- (a) Should it be assumed that Contracting States will, or will not, make use of the comparison?
- (b) Can Contracting States which do not in general make provision for the comparison invoke it none the less, if they so desire? 85/

There is nothing in the history of Article IV(4) or in the General Report of the Geneva Conference that casts any light on this question, on which radically opposing views have been expressed.

Bogsch acknowledges that, since the UCC contains no clear answer on the point, an argument can be made that "a country may 'cut back' in any manner it pleases, i.e., even by remaining silent." However, he clearly favors a different interpretation:

On the other hand, and this seems to be a more logical solution, one could argue that the permission given by the Convention to "cut back," is a permission given to the countries (and not to those private persons who may want to use foreign works) and that the will of countries in matters of copyright law is usually manifested by laws, orders, or other general rules. One could also argue that, from a practical viewpoint, unless the will of the country is expressed in the form of a general rule, the owners of copyright and the prospective users are left in such an uncertainty as to their rights and obligations which would be repugnant to common sense. Consequently, this argument would conclude, countries wishing to make use of the permissive rule of Article IV, paragraph 4, must enact general rules to this effect. 86/

This view has been contested by leading French copyright experts. In their recent treatise on the international intellectual property conventions, Desbois, Françon, and Kerever take the position that comparison of terms is an automatic rule of the convention which applies in a country in the absence of any provision of domestic law.^{87/} They point to the comparison of terms provision in the Berne Convention, which applies automatically unless a country's law declares otherwise; in their view, it would be "surprising" and "abnormal" if the UCC were construed as offering broader protection to authors than the Berne Convention on this point.

Although it did not take any final position on this issue, the Unesco Secretariat's 1957 Report on the Comparison of Terms of Protection^{88/} offers support for the French position. It phrased the question in terms of "renunciation": "When a State has no provision for the comparison of terms in its domestic law, and makes no provision for such a comparison in the measure for the integration of the Universal Convention, does it thereby renounce the right to invoke the principle in all circumstances?" The Report cited learned authorities to the effect that renunciation is the "deliberate abandonment of a right" which, though "not subject to specific forms," must be "indisputable" and cannot be presumed; although renunciation may be made tacitly, "mere silence on the part of a State does not imply renunciation." The Report on this point concludes as follows:

If the State cannot renounce, by failure to use it, a right of action stipulated in an international convention, there would appear to be no obstacle to its invoking the comparison of terms.

On the other hand, if failure to use can constitute tacit renunciation, -- which would be, according to jurisprudence and legal literature, rather questionable -- the State would not apparently be entitled to invoke the comparison of terms.

When the question came before the Second Session of the IGCC in 1957, differences of opinion prevented the Committee from taking a single position.

The Report summarizes the discussion as follows:

Conflicting views were expressed as to the consequences of a given State not taking specific measures, legislative or otherwise, in the respect at the time of its ratification, adherence or acceptance. The Representative of Switzerland, Mr. H. Morf, was of the opinion that the general rule of Article II, paragraph I, which provides for national treatment, should prevail in such a situation, and that courts could not apply the principle of comparison of terms if no legislation to this effect exists. Other members of the Committee were of the opinion that the principle of the comparison of terms may be applied by the courts of a Contracting State even if the legislation of the said State does not expressly make provisions therefor.

The Representative of the United States of America expressed the view that since this question may be the subject of divergent opinions, it was desirable that each Contracting State which intends to apply the principle of the comparison of terms make express provision to this effect in its legislation.

It was suggested that States should not be encouraged to make use of their power to make a comparison of terms, whether by specific measures adopted at or after the time they become party to the Convention, or in judicial decisions, since the comparison of terms constitutes an exception to the general principle of national treatment and its application can only result in a diminution of protection.

In view of the divergences of opinion concerning the methods of possible application of Article IV, paragraph 4, and although several members of the Committee expressed the opinion that advance clarification would always be desirable for all those who might be called upon to apply this provision of the Convention, the Committee as a whole refrained from expressing a view on this matter, particularly since the country which had raised the question in the first session of the Committee has, in the meantime, ratified the Convention. 89/

The comparison of terms rule has been adopted by legislation in Denmark, ^{90/} the Federal Republic of Germany, ^{91/} Israel, ^{92/} Japan, ^{93/} the Netherlands, ^{94/} and Sweden; ^{95/} it evidently has also been adopted by law in Finland, ^{96/} Italy, ^{97/} and the Holy See. ^{98/} However, in at least some of these cases, the wording of

the legislation refers only to lowering the term where the duration of protection in the country of origin has "expired";^{99/} it is questionable whether the legislation in these cases would authorize the denial of protection for a "class of works" given no protection in the country of origin. The rule of comparison of terms is not in effect in Switzerland,^{100/} the United Kingdom,^{101/} or the United States.^{102/} In Austria, section 1 of the Law of November 7, 1956, authorizes the Federal Ministry of Justice to reduce by decree, in accordance with Article IV(4) of the UCC, the term of protection for UCC works, "if such reduction is necessary in order to protect Austrian interests in a given State";^{103/} however, this authorization has never been implemented.^{104/}

The national legislation of France contains no provision adopting the rule of comparison of terms. However, as already indicated, French representatives and legal experts have consistently taken the position that no general legislative provision was necessary in order for the French courts to apply the rule in individual cases.^{105/}

In June, 1974, not long after accession by the Soviet Union to the Universal Copyright Convention, a joint meeting of French and Soviet legal experts was held to discuss mutual international copyright problems arising under the new relationship. A sharp issue was drawn as to whether, in the absence of any legislative provision or court decision holding that the comparison of terms was applicable, it would be possible for France to deny protection to Soviet works under Article IV(4) of the UCC.^{106/}

In fact, shortly before the Moscow meeting, on April 24, 1974, a French court had handed down a significant decision on the point. In a case involving an American film in which the U.S. copyright had not been renewed and had expired after 28 years, the Paris Cour d'appel (1^{re} ch.) had held that, since the work was in the public domain in its country of origin, it was not

entitled to protection of private rights in France.^{107/} This decision was upheld on appeal by the Cour de cassation on December 15, 1957.^{108/} Françon notes that this decision may be sufficient, in itself, to constitute any necessary implementation of the rule of comparison of terms.^{109/} Kerever, while noting that it is "obviously premature to determine whether or not this judgment -- still an isolated case, so far as we know -- establishes a precedent in the matter," commends the "solidity of the juridical reasoning followed by the Court," and adds:

In a country where, traditionally, the protection of copyright results from a close overlapping of texts of actual law and of case-law constructions, a judge, the same as a legislator, is one of the authorities of the State whom article IV, par. 4, authorizes to limit the term of protection. And this is the more true for the fact that, in contradistinction to many foreign laws, the French Law of 1957 is mute as to its application, or non-application, to works of foreign origin. It is traditionally the judge who makes up for this lacuna of silence, in light of the international conventions to which France is a party. 110/

In view of these differences of opinion, it is somewhat difficult to summarize the situation with respect to the implementation of Article IV(4). Nevertheless, it is possible to draw certain general conclusions with respect to this question:

(1) As the IGCC unanimously agreed, a country may elect whether or not to apply the comparison of terms provision of Article IV(4) of the UCC; and, if the country chooses not to apply the provision, it need not adopt legislation to this effect.

(2) It is therefore necessary to examine the domestic law of the country where protection is claimed, to determine whether the comparison of terms is applicable to UCC works in that country.

(3) One interpretation of the UCC is that, unlike the Berne Convention, the comparison of terms provision of Article IV(4) must be implemented affirmatively by some general rule of law to be effective in the country.

(4) Several countries have adopted provisions to implement Article IV(4). In those countries the scope of the comparison is presumably governed by the legislative provisions in question. In at least some of these cases, the scope of the allowable comparison appears to be limited to the duration of the copyright term, and not to extend to the basic eligibility of the work for copyright protection.

(5) Another interpretation of the UCC is that, even in the absence of any legislative provisions, the courts of a country are free to apply the comparison of terms provision on a case by case basis; under this theory a country cannot be said to have renounced the right to apply the rule of Article IV(4) merely through failure to assert it. This position had been taken by legal experts in France even before the French courts had dealt with the question.

(6) There is now case law in France holding that Article IV(4) is applicable in that country, and it is arguable that this judgment represents a sufficiently general rule of law to make the comparison of terms applicable in other French cases. Even if this were true, however, two points must be remembered: First, that the case in question dealt only with the situation where the length of copyright duration was longer in France than it was in the country of origin, and where the comparison of terms was necessary to achieve reciprocity. It did not deal with the situation where the class of works was not protected in the country of origin; nor did it deal with the situation to which this paper is addressed: where the work in question is in the public domain in the country of origin but where, in the reciprocal situation, French works would be fully protected in the other country. Second, the precise issue arising out of the Universal Convention concerns the effect of the second paragraph of Article IV(4), which establishes conditions of reciprocity quite

different from those flowing from Article IV(4), first paragraph. This second paragraph provides for comparison of terms with respect to specific works in their second or subsequent terms of protection in the country of origin.

Final Summary of Conclusions

(1) With respect to the scope of reciprocity under Article IV(4):

(a) The country where protection is claimed (Country A) can, if it chooses, refuse to protect a work of Country B if --

(i) the work belongs to a "class of works" that is protected longer in Country A than in Country B, and the copyright term for the class in Country B has expired; or

(ii) the work belongs to a "class of works" that is eligible for protection in Country A but not in Country B.

(b) Country A cannot refuse to protect a work of Country B where the work belongs to a "class of works" that is protected in both Country A and Country B and the term in neither country has expired --

(i) even if the scope of the rights applicable to the work are greater in Country A than in Country B; and

(ii) even if the particular work in question is in the public domain in Country B.

(c) With one exception, the United States protects government works of UCC countries; the exception is for works written by employees of the United States itself. Thus, a UCC country cannot justify refusing to protect U.S. government works on the ground of reciprocity. If protection is refused, the action would have to be based on a literal interpretation of the wording of Article IV(4).

(2) With respect to the meaning of "class of works" in Article IV(4):

- (a) A "class of works" can be interpreted broadly to include any "recognized categories," including combinations and subdivisions of groups, but it does not include individual works or congeries of them.
- (b) To apply the comparison of terms under Article IV(4), Country A is first impelled by the principle of national treatment in Article IV(1) to determine the applicable class and term for the work under its own law, and then to find the corresponding class and term under the law of Country B. It can apply the shorter of the terms for the corresponding class, but without regard to the status of the individual work in Country B.
- (c) To deny a U.S. Government work protection under Article IV(4), Country A would have to look only to the law of the country of origin, disregarding the corresponding "class of works" under its own law and the fundamental purpose of assuring reciprocity under Article IV(4).
- (d) If Country A looks first at its own law to determine the "class of works" into which a U.S. government work falls, the class can be identified as "works of foreign governments." Since both countries protect that class, the comparison of terms provision of Article IV(4) would not be applicable under this theory.

(3) With respect to the implementation of Article IV(4):

- (a) A country is free to elect whether or not to apply the comparison of terms; and, if it chooses not to apply the rule, it is under no obligation to adopt legislation for this purpose.

There are two theories on this point:

- (i) Under one theory, only those countries that have legislation implementing Article IV(4) can apply the comparison of terms to works of other UCC countries, and then only to the extent that the legislation provides.
- (ii) Under another theory, the courts of a country are free to apply the comparison of terms on a case-by-case basis, even in the absence of any legislative provision or judicial precedent.
- (c) Assuming, under either theory, that a country wishes to apply the comparison of terms, it would still be appropriate for the national legislature or courts to limit the scope of the comparison to cases where it is necessary to assure reciprocal treatment. ^{111/} Where, as in the case of a work of the U.S. government, the corresponding class of "works of foreign governments" is fully protected in the United States, the principle of reciprocity has no logical application.

NOTES

1. Act of October 19, 1976, title 17 of the United States Code, effective January 1, 1978. Section 105 of the new law broadens and clarifies the earlier prohibition against copyright in "any publication of the United States Government" in the Act of March 4, 1909.
2. Certain types of official government publications are widely regarded as uncopyrightable by their nature, on the theory that the public interest demands their free use without copyright restrictions. Examples are statutes, regulations, government orders, court decisions, and other documents having the force of law or official effect.
3. H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. (1976) at 59.
4. The copyrightability of works in the U.S. Government was a controversial issue throughout the long period of Congressional consideration of the bill that became the Copyright Act of 1976. In 1965, during consideration of an earlier bill for revision of the copyright laws, the Department of the Air Force submitted the following statement to the House of Representatives Subcommittee responsible for copyright legislation:

Another important reason for permitting copyright in certain works of the U.S. Government is to qualify them for copyright protection in certain foreign countries. Where the foreign rights are to be exploited, the lack of at least nominal copyright protection (with the U.S. copyright licensed free to the American public) may foreclose copyright protection abroad. COPYRIGHT LAW REVISION, Hearings on H.R. 4347 Before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess. 1123 (1965).

These views were largely shared by the Department of Defense, but the National Aeronautics and Space Administration (NASA) held a somewhat different view:

Permitting the issuance of copyrights to Government agencies in exceptional cases would also facilitate copyrighting of U.S. Government publications abroad. It is a commonly held opinion that the prohibition against obtaining copyright by the Government applies to domestic copyrights only. Thus the Government may copyright abroad when that serves its best interests. While we feel that many foreign signatories to the Universal Copyright Convention would honor the copyright of the U.S. Government in their respective countries under the Convention, we are aware that article IV, paragraph 4 of that Convention provides, in essence, that the foreign country in which registration is sought is not obliged to grant protection for a period longer than that granted by the State in which the work is first published. Accordingly, if the United States does not protect its own Government publications a foreign nation may take the position that, since the U.S. Government publication cannot receive protection in the United States, such publications cannot receive protection elsewhere. Accordingly, it appears to be in the best interests of the United States to permit copyright in certain exceptional cases so as to provide opportunity for foreign copyright and to prevent loss of potentially valuable foreign rights. Id. at 1183.

4. (Cont'd) In 1976 the U.S. Department of Commerce proposed an amendment to section 105 that would have permitted a limited copyright in publications of the National Technical Information Service (NTIS). Under the amendment, which was accepted by the House of Representatives, the Secretary of Commerce would have been authorized to secure copyright in NTIS publications, on behalf of the United States as author or copyright owner, for a limited term not to exceed five years. The legislative history of this amendment shows clearly that its main purpose was to assure copyright protection for NTIS publications in foreign countries.

The Senate did not accept the proposed amendment, and the provision was dropped from the bill by the Conference Committee of the two Houses. However, the Conference Committee report urged that "the NTIS request for limited copyright in order to control foreign copying be considered at hearings early in the next session," and added:

Widespread copying of NTIS publications is especially prevalent in foreign nations. . . . The lack of copyright protection in NTIS publications also results in widespread foreign use of U.S. tax-funded research and development without any return to the U.S. U.S. organizations also sell NTIS publications to foreign buyers without recouping for the taxpayer, as represented by NTIS, monies adequately reflecting the value of the scientific, engineering, and technical information contained therein. H.R. REP. NO. 94-1733, 94th Cong., 2d Sess. (1976) at 69-70.

5. There are minor differences in the wording of Article XI in the 1952 and 1971 texts, but no difference in substance. Henceforth in this paper, where there are no substantive differences between the two texts, the Convention will be referred to simply as "the UCC." Where differences exist, the specific text will be identified.
6. For example, the IGCC has considered questions concerning the use of the UCC copyright notice [Report of the First Session of the IGCC, in COPR. BULL. (UNESCO), vol. 9, no. 2 (1956), p. 136; Report of the Second Session of the IGCC, in COPR. BULL. (UNESCO), vol. 10, no. 2 (1957), pp. 215, 225-226, and the protectability of theatre decors under the UCC (id. at 220).
7. Report of the First Session of the IGCC, in COPR. BULL. (UNESCO), vol. 9, no. 2 (1956), pp. 135-136; Report of the Second Session of the IGCC, in COPR. BULL. (UNESCO), vol. 10, no. 2 (1957), pp. 214-215. For a full discussion of the Committee's consideration of this issue, see notes 79-84, 88-89, infra, and text thereto.
8. The second sentence of Article IV(2)(a) states:

However, any Contracting State which, on the effective date of this Convention in that State, has limited the term for certain classes of works to a period computed from the first publication of the work, shall be entitled to maintain these exceptions and to extend them to other classes of works. For all these classes the term of protection shall not be less than 25 years from the date of first publication.

8. (Cont'd) The format of the 1952 text of the Universal Copyright Convention -- including paragraphing, internal paragraph numbers and letters, and some consequential wording in Article IV -- was changed in the 1971 revision. The quotations in this footnote and in notes 9, 10, 13, 14, and 15, follow the 1971 text. There are no differences in substance.

9. The second and third paragraphs of Article IV(2) states:

(b) Any Contracting State which, upon the effective date of this Convention in that State, does not compute the term of protection upon the basis of the life of the author, shall be entitled to compute the term of protection from the date of the first publication of the work or from its registration prior to publication, as the case may be, provided the term of protection shall not be less than twenty-five years from the date of first publication or from its registration prior to publication, as the case may be.

(c) If the legislation of a Contracting State grants two or more successive terms of protection, the duration of the first term shall be not less than one of the minimum periods specified in sub-paragraphs (a) and (b).

10. Article IV(3) provides:

The provisions of paragraph 2 shall not apply to photographic works, or to works of applied art; provided, however, that the term of protection in those Contracting States which protect photographic works, or works of applied art in so far as they are protected as artistic works, shall not be less than ten years for each of said classes of works.

11. The law on this point in effect before 1978 had been enacted as section 23 of the Act of March 3, 1909, later codified with some revisions as section 24 of title 17, United States Code. Works in which Federal copyright protection had been secured and was still subsisting on December 31, 1977 (the day before the new law came into effect), are given longer protection under the new law (title 17, U.S. Code §304), but their term is still based on publication and registration and is still subject to renewal. The first term remains 28 years and the second is now 47 years, making a total potential copyright duration of 75 years. For copyrights that had already been renewed when the new law came into effect, the prolongation of the second term was automatic; for works still in their first term, renewal registration is required as a condition for securing the second term of 47 years. Under sections 302 and 303 of the new law, works created on or after January 1, 1978, and works created but not published or copyrighted before that date, are given a term based (with some exceptions) on the life of the author and fifty years after the author's death.

12. Article II of the original Berne Convention (1886) provided:

The enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and must not exceed in the other countries the

12. (Cont'd)

term of protection granted in the said country of origin. [emphasis supplied]

The historic Berlin revision of the Berne Convention (1908) transformed the Convention by making protection completely "independent of the existence of protection in the country of origin of the work" and by prohibiting "any formality" as a condition of copyright. The Berlin revision established "the life of the author and fifty years after his death" as the standard for duration of copyright under the Convention, but it was unable to make this an obligatory requirement; the second paragraph of article 7 acknowledged that other terms could be provided and retained the rule of comparison of terms:

Nevertheless, in case such term of protection should not be uniformly adopted by all the countries of the Union, the term shall be regulated by the law of the country where protection is claimed, and must not exceed the term fixed in the country of origin of the work. Consequently the contracting countries shall only be bound to apply the provisions of the preceding paragraph [establishing the life-plus-fifty standard] in so far as such provisions are consistent with their domestic laws. [emphasis supplied]

The Rome revision of the Berne Convention (1928) did not change this legal situation. However, at the Brussels revision (1948), the life-plus-fifty term was made obligatory for countries linked by the Brussels text, and the second paragraph of article 7 was revised as follows:

2. However, where one or more countries of the Union grant a term of protection in excess of that provided by paragraph 1, the term shall be governed by the law of the country where protection is claimed, but shall not exceed the term fixed in the country of origin of the work.

This change of wording in the Brussels text raised a number of questions, including two questions concerning the application of the rule of comparison of terms: (1) was the provision limited to comparison between a life-plus-fifty term and a longer term, or could comparison of terms be applied in other cases (e.g., differing terms for cinematographic works)? (2) was the country with the longer term obliged to give works of the other country the shorter term, or could it choose to offer those works national treatment?

The Stockholm revision (1967) sought to answer these questions. Article 7 now consists of eight paragraphs. Paragraph (1) retains the obligatory life-plus-fifty term as the Convention standard. Paragraphs (2) through (5) provide special terms for cinematographic works, anonymous and pseudonymous works, photographs, and works of applied art. Paragraph (6) makes clear that countries are free "to grant a term of protection in excess of those provided by the preceding paragraphs." Paragraph (7) still

12. (Cont'd) is intended to allow Berne Union countries offering shorter terms than those required by the Brussels text to retain those terms and nevertheless adhere to the revised convention:

(7) Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present Act.

The eighth and last paragraph of Article 7 provides for the rule of comparison of terms. It makes clear that the rule can be applied to any and all terms of protection under Article 7. It also makes clear that, while the shorter term applies as a rule, the country where protection is claimed has the option of offering longer protection through domestic legislation:

(8) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.

The Stockholm text of Article 7 was adopted without change in the Paris revision of 1971, which entered into force on October 10, 1974, and is now the latest text of the Convention.

When the Intergovernmental Copyright Conference met in Geneva in 1952 to draw up the Universal Copyright Convention, the rule of comparison of terms had already been a part of the Berne Convention for some 65 years, and had recently been scrutinized and revised at the Brussels Conference in 1948. It is not surprising that representatives of Berne countries at Geneva were unwilling to abandon the principle.

13. Paragraph (b) of Article IV(4) provides:

(b) For the purposes of the application of sub-paragraph (a), if the law of a Contracting State grants two or more successive terms of protection, the period of protection of that State shall be considered to be the aggregate of those terms. However, if a specified work is not protected by such State during the second or any subsequent term for any reason, the other Contracting States shall not be obliged to protect it during the second or any subsequent term.

14. The following is the text of Article IV(5):

5. For the purposes of the application of paragraph 4, the work of a national of a Contracting State, first published in a non-Contracting State, shall be treated as though first published in the Contracting State of which the author is a national.

15. Article IV(6) specifies as follows:

6. For the purposes of the application of paragraph 4, in case of simultaneous publication in two or more Contracting States, the work shall be treated as though first published in the State which affords the shortest term; any work published in two or more Contracting States within thirty days of its first publication shall be considered as having been published simultaneously in said Contracting States.

16. Recommendations of the Third Committee of Experts, in COPR. BULL. (UNESCO), vol. 3, nos. 3-4 (1950), p. 11. See also Summary Records of the Eleventh Session of the Third Committee of Experts, in COPR. BULL. (UNESCO), vol. 3, nos. 3-4 (1950), pp. 72-77, 88.
17. Draft of the Universal Copyright Convention, in COPR. BULL. (UNESCO), vol. 4, no. 3 (1951), pp. 8-9. The Report of the Fourth Committee of Experts noted:

In view of the great divergencies of governmental opinions it was impossible to arrive at a compromise text, and after long and very extensive discussion in Group No. I and in the plenary meeting it was decided to submit for the consideration of the Governments three alternative texts. Since the main point of difference was the comparison of durations, the U.S. delegate declared that his country under any such proposal would consider that the duration of the protection according to U.S. law comprised the two periods totalling 56 years.

COPR. BULL. (UNESCO), vol. 4, no. 3 (1951), p. 22.

18. Records of the Intergovernmental Copyright Conference, Geneva, 18 August - 6 September 1952, at 341 (1955). The records of the Geneva Conference will henceforth be cited as "1952 Records."
19. See COPR. BULL. (UNESCO), vol. 5, no. 1 (1952), pp. 18, 32. At the diplomatic conference, Greece and Cuba also indicated support for Proposition A. 1952 Records at 155, 341.
20. Observations of Luxembourg on the preliminary draft of the Universal Copyright Convention, in COPR. BULL. (UNESCO), vol. 5, no. 11 (1952), p. 10. Observations by various countries in this series will henceforth be cited as "Observations."
21. United States of America, Observations, in COPR. BULL. (UNESCO), vol. 5, no. 11 (1952) p. 32.
22. The observations of Canada expressed a preference of Proposition C over Propositions A and B, but appeared to reject all three in favor of a system of pure national treatment. Canada, Observations, in COPR. BULL. (UNESCO), vol. 5, no. 2 (1952), p. 9.
23. Syria, Observations, in COPR. BULL. (UNESCO), vol. 5, no. 1 (1952), p. 16; Switzerland, Observations, in COPR. BULL. (UNESCO), vol. 5, no. 2 (1952) p. 31; United Kingdom, Observations, in id. at 33; Yugoslavia, Observations, in id. at 36.

24. Mexico, Observations, in COPR. BULL. (UNESCO), vol. 5, no. 2 (1952), p. 21; Italy, Observations, in COPR. BULL. (UNESCO), vol. 5, no. 1 (1952) p. 23; Norway, Observations, in COPR. BULL. (UNESCO), vol. 5, no. 2 (1952) p. 26. Mexico considered Proposition C the "most equitable" of the three propositions submitted. However, it added that, "in view of the practical difficulties which might be met in securing approval for it, the compromise Proposition B could be accepted" if it were amended to accommodate the life-plus-twenty term of Mexico and three other countries. Italy declared that, in the "event of it proving impossible, because of the different systems of national legislation, to reach unanimous agreement in Proposition C, . . . consideration should be given to Proposition B.
25. Netherlands, Observations, in COPR. BULL. (UNESCO), vol. 5, no. 1 (1952), p. 27; Philippines, Observations, in id. at 28; Brazil, Observations, in COPR. BULL. (UNESCO), vol. 5, no. 2 (1952), p. 7. The Netherlands expressed concern only that the principle of comparison of terms be adopted in Article IV.
26. Observations of: Austria, in COPR. BULL. (UNESCO), vol. 5, no. 1 (1952), p. 12; Spain, in id. at 15; Japan, in id. at 19; Belgium, in id. at 21; Iceland, in id. at 25; France, in id. at 26; German Federal Republic, in id. at 30; Australia, in COPR. BULL. (UNESCO), vol. 5, no. 2 (1952), p. 5; Monaco, in id. at 24; India, in id. at 18; Sweden, in id. at 28; Finland, in id. at 17; Denmark, in id. at 14; Chile, in id. at 12.
27. 1952 Records at 78.
28. Id. at 138.
29. Ibid.
30. Id. at 335.
31. Id. at 139.
32. Id. at 142.
33. Ibid.
34. Id. at 156.
35. Reprinted in id. at 341.
36. Id. at 155.
37. Reprinted in id. at 342.
38. Documents DA/103 and DA/121, offered respectively by France and by four Nordic countries, reprinted in 1952 Records at 342.
39. Reprinted in 1952 Records at 342-43.
40. Id. at 192.
41. Id. at 193.

42. Id. at 194.

43. Id. at 195.

44. Reprinted in id. at 343.

45. Id. at 230.

46. Ibid.

47. Reprinted in id. at 343.

48. Id. at 230.

49. Id. at 343.

50. Id. at 79-80.

51. Id. at 157-58. This hope was, in fact, realized on January 1, 1978, when the new U.S. copyright law with its life-plus-fifty term came into effect.

52. Bogsch has no doubts on this score:

Naturally, if the duration [which the laws of the country of origin grant to the class of works to which the particular work belongs] is zero -- i.e., when the class is not protected by copyright in the work's country of origin -- the country in which protection is sought is free to deny protection to the work even if, under the latter country's law, works of the class to which the particular work belongs enjoy protection.

A. Bogsch, *The Law of Copyright Under the Universal Convention* (3d ed. 1968) at 54. Other leading international copyright experts agree with this view; see, for example, H. Desbois, A. Françon, and A. Kerever, *Les Conventions Internationales du Droit d'Auteur et les Droits Voisins* (Paris, 1976) at 96; A. Françon, Note, 88 RIDA 117 at 118; M. Dock, *Convention universelle sur le droit d'auteur*, in *Jurisclasseur Propriete litteraire*, fasc. 24, p. 30.

53. Bogsch states this point as follows:

On the other hand, if the particular work is not protected in its country of origin (due, for example, to failure to comply with initial domestic formalities), this circumstance, in itself, will not excuse the country in which protection is sought from the duty to protect the work if the class of which it belongs according to the law of its country of origin is protected in its country of origin.

53. (Cont'd) A. Bogsch, op. cit. supra note 52 at 54. See also H. Desbois, A. Françon, and A. Kerever, op. cit. supra note 52 at 96; Dock, op. cit. supra note 52, p. 30. Françon, op. cit. supra note 52 at 118, notes that this represents the prevailing view among copyright experts, but raises a question as to whether it would be accepted by the French courts in view of the broad language used by the court in a recent decision ruling against French rights in a work of U.S. origin in which copyright had not been renewed. For a discussion of this case, see notes 107-110, infra, and text thereto.
54. Françon, op. cit. supra note 52 at 118-19, agrees with this view. Bogsch, op. cit. supra note 52 at 55-56, took the view in his 1968 treatise that, where two countries both protect a work, but some rights in the work are protected for a shorter duration in one country than the other, the country where protection is claimed can refuse to recognize rights that have expired in the country of origin. This position may be difficult to sustain in view of the extensive discussion and strong declarations on material reciprocity at the 1971 UCC revision conference.
55. See note 53, supra.
56. 1952 Records at 156, 157. As the result of "difficulties about extra-territoriality, about the status of international organizations as legal persons, and about the vesting of copyright in those organizations," protection for international organizations was included as Protocol 2 annexed to the UCC, rather than as a part of the UCC itself. Id. at 75.
57. Id. at 193.
58. Id. at 155.
59. Reprinted in id. at 342.
60. See notes 40-47, supra, and text thereto.
61. 1952 Records at 193.
62. Ibid.
63. Id. at 230.
64. Id. at 79.
65. Id. at 79-80.
66. The U.S. Copyright Act of 1976 changed this classification scheme. Section 102 of the new law lists seven broad categories of copyrightable subject matter focusing on the nature of the author's creative activity rather than the physical medium of expression (for example, "literary works" rather than "books"). The statute makes clear that this list is not exhaustive.

67. Bogsch, op. cit. supra note 52 at 47-48.
68. Document DA/102, the first compromise proposal on Article IV, was put forward by Austria, Germany, Italy, Netherlands, the United Kingdom, and Switzerland, and was withdrawn in favor of document DA/137. It proposed a comparison of terms provision reading: "The Contracting States shall not be held to grant protection to a work fallen in the public domain as a result of the expiration of the term of protection in the country [of origin]." 1952 Records at 342.
69. This was the proposal put forward and pressed on several occasions by the Japanese delegation. See notes 28-33, 35, 40-42, 45, supra, and text thereto.
70. See notes 45-50 supra, and text thereto.
71. The underlying question that forced the last minute redrafting of Article IV(4) was whether works that had fallen into the public domain in their country of origin through failure to comply with formalities constituted a "class" to which comparison of terms could be applied. The Conference clearly decided that works of this sort would not constitute a "class," and drew a distinction between "classes" and "given works," but offered no affirmative definition of "class" in paragraph (4).
72. 1952 Records at 79-80.
73. Bogsch, op.cit. supra note 52 at 52.
74. See Dock, op. cit. supra note 52 at 29-30.
75. See note 18, supra, and text thereto.
76. See notes 37-39, supra, and text thereto.
77. 1952 Records at 155.
78. Id. at 157.
79. Report of the First Session of the IGCC, in COPR. BULL. (UNESCO), vol. 9, no. 2 (1956), p. 135.
80. Id. at 135-36; Summary Records of the First Session of the IGCC, in COPR. BULL. (UNESCO), vol. 9, no. 2 (1956), pp. 190-95.
81. Report on the Comparison of Terms of Protection, in COPR. BULL (UNESCO), vol. 10, no. 2 (1957), p. 239 at 240.
82. Id. at 244.
83. Report of the Second Session of the IGCC, in COPR. BULL. (UNESCO), vol. 10, no. 2 (1957), p. 214. See also Summary Records of the Second Session of the IGCC, in COPR. BULL. (UNESCO), vol. 11, no. 1 (1951), p. 9. With respect to the first question of "whether the provision prescribed or allowed comparison of terms," Mr. Puget of France acknowledged that

83. (Cont'd) "the provision conferred a faculty and not an obligation," and Mr. Ulmer of the German Federal Republic said that "the provision was doubtless facultative."
84. Report of the Second Session of the IGCC, in COPR. BULL. (UNESCO), vol. 10, no. 2 (1957), pp. 214-15.
85. COPR. BULL. (UNESCO), vol. 10, no. 2 (1957), p. 240.
86. Bogsch, op. cit. supra note 52 at 53.
87. Desbois, Francon, and Kerever, op. cit. supra note 52 at 95-96.
88. COPR. BULL. (UNESCO), vol. 10, no. 2 (1957), p. 245.
89. Id. at 214-15. See also COPR. BULL. (UNESCO), vol. 11, no. 1 (1958), p. 9.
90. Decree of October 5, 1961, as amended by Ordinance of November 18, 1963, §§6, 7.
91. Act of February 24, 1955, concerning the Universal Copyright Convention, as amended, Article 2(a).
92. Copyright (International Convention) Order 5715 of August 2, 1955.
93. Law No. 86 of April 28, 1956, as amended, Article III.
94. Act of September 23, 1912, Article 42.
95. Royal Proclamation of May 25, 1973, §2(2).
96. Law of July 8, 1961, Article 65. See 3 Nimmer, the Law of Copyright §17.10[A] (1979).
97. See Nimmer, op. cit. supra note 96.
98. Law of January 12, 1960.
99. This seems to be true of the statutory provisions in effect in Denmark, Japan, the Federal Republic of Germany, the Netherlands, and Sweden.
100. See Nimmer, op. cit. supra note 96.
101. Ibid.
102. Section 104 of the Act of 1976 (17 U.S.C. §104) assimilates all unpublished works as well as published works of which the author is a "national, domiciliary, or sovereign authority" of a party to the UCC.
103. Bundesgesetzblatt, 1957, p. 702, item 109.
104. See Nimmer, op. cit. supra note 96.
105. See, e.g., Desbois, Francon, and Kerever, op. cit. supra note 52 at 95.

106. A. Kerever, On the Term of Protection of Soviet Works in France, 85 RIDA 165 (1975).
107. Reported in 83 RIDA 106 (1975).
108. Reported in 88 RIDA 115 (1976).
109. Françon, op. cit. supra note 52 at 120.
110. Kerever, op. cit. supra note 106 at 172.
111. It is interesting that this very point was anticipated by the representative of the United Kingdom in discussion of the question of comparison of terms at the First Session of the IGCC (1956). Mr. Girling made the following remarks:

The United Kingdom was very anxious to have further information regarding the extension of copyright protection to non-nationals, by other countries. The United Kingdom made its own copyright laws and the authorities had received permission to apply those laws to other Contracting States. Furthermore, it was possible for the British authorities to take retaliatory action, by means of the passing of Orders in Council. Steps could be taken, for instance, to limit the protection accorded to nationals of a State which did not give the work of British subjects adequate protection or so long a term of protection as is given by United Kingdom law. It would be most unfair to such a State if, in drafting these orders, retaliatory action were taken inadvertently against a country which granted United Kingdom nationals more protection than it gave its own people. For that reason, his government would be glad to receive further information concerning those States that granted less protection to nationals of other Contracting States than to their own nationals, and vice versa. [emphasis supplied] Summary Records of the First Session of the IGCC, in COPR. BULL. (UNESCO), Vol 9, no. 2, (1956), p. 195.